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No. 503

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IN THE

Supreme Court of the United States

OCTOBER TERM 1967

THE BROOKLYN UNION GAS COMPANY, LONG ISLAND LIGHTING COMPANY, and PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Petitioners*,

v.

STANDARD OIL COMPANY OF TEXAS, a Division of Chevron Oil Company, ET AL., *Respondents*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS SUNRAY DX OIL COMPANY, TEXACO INC., SUN OIL COMPANY, SOHIO PETROLEUM COMPANY, EDWIN L. COX, HUMBLE OIL & REFINING COMPANY, LAMAR HUNT, GEORGE H. COATES, PATCHIN-WILMOTH INDUSTRIES, INC., AND CLARK FUEL PRODUCING COMPANY

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OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals for the Tenth Circuit setting aside the Federal Power Commission's Opinion Nos. 501 and 501-A and the opinion on rehearing of that court are reported at 376

F. 2d 578, 580. These opinions of the court below have been printed as Appendix A to the brief in opposition of the undersigned Respondents in Nos. 80 and 97 (O.T. 1967).[1] The Commission's Opinion No. 501 is reported at 36 FPC 309.

JURISDICTION

The judgments of the court below were entered on March 27, 1967 (Pet. No. 80, App. B, pp. 14-21). Rehearing, sought only by the undersigned Respondents, was denied on May 18, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

The question presented by this petition (No. 503) is identical to Question No. 2 presented by these same petitioners in No. 62, this Term (originally No. 1135, O.T. 1966). That question seeks review of the Tenth Circuit's determination that the Commission lacked the power, in the circumstances presented, to require retroactively the refund by Respondents of amounts collected pursuant to temporary certificates of public convenience and necessity which did not even suggest the possibility of such refund impositions. Indeed, the Commission itself expressly negated the possibility of such impositions in its subsequent order (29 FPC 218).

The court below had previously determined that the Commission lacked such refund power in the identical circumstances when it reviewed the Commission's

[1] The petitions in Nos. 80 and 97, filed by the Commission and The United Gas Improvement Company in April 1967, seek review of these same opinions of the court below.

Opinion Nos. 422 and 422-A[1] in *Sunray DX Oil Company, et al.* v. *Federal Power Commission*, 370 F. 2d 181 (10th Cir. 1966). A petition for a writ of certiorari seeking review of that question has already been filed by these same Petitioners in the pending *Sunray* litigation (No. 62, O.T. 1967).[2] The undersigned Respondents have filed answers in opposition to that petition.

The refund power question presented here and by Nos. 60, 61 and 62 is:

> May the Commission retroactively order refunds of amounts collected under lawfully issued temporary certificates when, pursuant to legal precedent and its established policies, the Commission determined both at the time of issuance of such certificates and upon subsequent reconsideration that no refund liabilities should be imposed?

STATUTES INVOLVED

The pertinent provisions of Section 7 of the Natural Gas Act, 15 U.S.C. 717(f), are set forth in the Commission's pending petition in No. 80 (pp. 2-3).

STATEMENT

In *Sunray DX Oil Company, et al.* v. *Federal Power Commission, supra,* the Court of Appeals for the Tenth Circuit held in a carefully considered opinion that the Federal Power Commission lacked the power,

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[1] *Amarada Petroleum Corporation, et al.*, Opinion Nos. 422 and 422-A, 31 FPC 623, 1315 (1964).

[2] The *Sunray* litigation is before this Court by virtue of the petitions in Nos. 60, 61 and 62. Viewed together, these three petitions present not only the identical refund power question raised here but an additional question concerning the propriety of the Commission's "price line" determination which was affirmed by the court below in *Sunray*.

in the circumstances presented, to order Respondents to refund amounts which they had collected in accordance with Commission orders granting temporary certificates.[1] In March 1967, The Brooklyn Union Gas Company, *et al.* (Brooklyn Union), filed a petition for a writ of certiorari seeking review of the Tenth Circuit's *Sunray* decision on the refund issue. In that same petition, Brooklyn Union also sought review of the Tenth Circuit's holding in *Sunray* that substantial evidence supported the Commission's 16.0 cent price line determination (No. 62).[2] Respondents answered in opposition to the request for certiorari in that case as well as the related petitions in Nos. 60 and 61.

Subsequently, in accordance with the position taken by the Commission and without briefing or oral argument, the Tenth Circuit issued its *per curiam* decision below setting aside the Commission's Opinion Nos. 501 and 501-A on the basis of its prior *Sunray* holding.

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[1] The petition in No. 503 is factually erroneous and misleading in stating (at pp. 2-3) that "... applicants proposed initial prices ranging from 15.9¢ to 19.8¢ per Mcf ..." and that "... each applicant was issued a temporary certificate authorizing commencement of the sale at the proposed initial price pending the outcome of the hearings." The sale referred to by Petitioners as having an initial rate of 19.8¢ per Mcf was authorized under the Commission's temporary certificate power to be made only at the 18¢ per Mcf guideline rate previously established by the Commission in its *Statement of General Policy No. 61-1*, 18 CFR 2.56(a), 24 FPC 818 (1960). The Commission did not issue a temporary certificate to any Respondent authorizing an initial rate higher than its 18¢ per Mcf guideline level.

[2] Petitions for certiorari were also filed by the Federal Power Commission (No. 60) and by The United Gas Improvement Company (No. 61).

As a protective measure, the Commission and The United Gas Improvement Company filed second petitions for certiorari seeking review of the Tenth Circuit's *per curiam* application of its *Sunray* holding (Nos. 80 and 97). Despite the fact that the Tenth Circuit had not addressed itself to the complex subsidiary issues involving the manner in which the Commission had exercised its claimed refund authority, both the Commission and The United Gas Improvement Company have requested this Court to review in the first instance the multi-issue question of whether the Commission had properly exercised the disputed refund power. Respondents opposed the grant of certiorari in Nos. 80 and 97 for the reasons they had previously expressed in opposing certiorari in Nos. 60, 61 and 62. Additionally, Respondents pointed out that the many complex issues involved in the question of the Commission's exercise of the refund power, not passed upon by the court below, should not be entertained and, consequently opposed the requested consolidation of Nos. 80 and 97 in the event review were granted in Nos. 60, 61 and 62 (Respondents' red brief in opposition, Nos. 80 and 97, pp. 7-12).

Brooklyn Union has now filed its protective petition for certiorari seeking review of the Tenth Circuit's *per curiam* application of its *Sunray* holding. Unlike petitioners in Nos. 80 and 97, however, Brooklyn Union has limited the question presented to whether the Commission has the power to order refunds in the circumstances and properly has not sought consolidation of the instant petition with Nos. 60, 61 and 62.

REASONS FOR DENYING THE WRIT

The question presented by No. 503 is a *verbatim* duplication of Question No. 2 raised by these same Petitioners in No. 62, pending before the Court. Petitioners state that their reasons for urging grant of certiorari here on the refund power question are identical to those stated in the pertinent portion of their pending petition in No. 62. Consequently, as reasons for denial of a writ here, the undersigned Respondents adopt the reasons previously stated in their briefs in opposition filed in Nos. 60, 61 and 62.

In any event Respondents respectfully request that the instant petition in No. 503, as well as the petitions in Nos. 80 and 97, be held to abide the Court's final disposition of the pending petitions in Nos. 60, 61 and 62 filed in the *Sunray* litigation. Such disposition would be wholly consonant with the Commission's position below and the Tenth Circuit's explicit reliance upon its prior *Sunray* decision. (376 F. 2d 578 at 581; see also Respondents' red brief in opposition, Nos. 80 and 97, p. 6). Further, this would not be detrimental to these Petitioners and, hopefully, would lighten the burden of the Court.

CONCLUSION

The petition for a writ of certiorari should be denied. In the event that the Court should grant the petition filed by these same Petitioners in No. 62 and the companion petitions in Nos. 60 and 61, the instant petition should be held to abide the Court's final disposition in Nos. 60, 61 and 62.

Respectfully submitted,

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